U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date Issued: MAY 24, 1989

Case No.: 88-INA-349

In the Matter of:

ATLANTIC SALES, INCORPORATED,
Employer,

on behalf of,

HUMBERTO GODINEZ,
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, Guill, Tureck and Williams, Administrative Law Judges

JAMES GUILL
Administrative Law Judge

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (C.O.) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (hereinafter AF), and any written arguments of the parties. See §656.27(c).

Statement of the Case

Atlantic Sales, Employer, is located in Santurce, Puerto Rico and is engaged in the sale and service of photofinishing equipment and equipment for the handicapped. On May 5, 1986 Employer filed an Application for Alien Employment Certification on behalf of Humberto Perez Godinez, Alien. The job title was Technical Service Manager for Specialized Equipment, and the job duties were listed as follows:

1. Installation, service and repair of computerized epuipment that "reads" to the visually impaired.

2. Installation, service, repair and operation of minilabs and conventional photofinishing equipment.

3. Proficient use of oscilloscope, logic probe, multimeter densitometer.

4. Knowledge of C-41, EP-2, E-6 chemical processes - quality control.

5. Ability to read schematic diagrams.

6. Train technical staff and operators.

The requirements for the position included three years of college with a major in Electronic Technology, one year of training in special equipment and photofinishing and four years of experience in the job offered. (AF 6).

Alien's qualifications included a B.S. in Mechanical Engineering; three years of experience in the job offered; training in specialized equipment distributed by Atlantic Sales; proficiency in the use of the oscilloscope, logic probe, multimeter, densitometer; knowledge of specialized systems relating to the photofinishing industry; excellent communication skills in both English and Spanish; and the ability to train personnel. (AF 1-5).

On October 1, 1986 the C.O. issued a Notice of Findings (AF 9-11), and on October 27, 1986 Employer responded. (AF 12-21). On December 22, 1986 the C.O. issued correspondence to Employer, noting, inter alia, that although Employer was requiring three years of college education with a major in Electronic Technology, Alien's background was in Mechanical Engineering. The C.O. instructed Employer to clarify how Alien meets this requirement. (AF 27-28).

On January 23, 1987 Employer responded by amending the job duties in item #13 of the ETA 750A and the job requirements in items #14 and #15. The job duties, as amended, read as follows:

a. Direct and supervise the installation, service and repair of computerized equipment that "reads" to the visually impaired.

b. Direct and supervise the installation, service and operation of mini-labs and conventional photofinishing equipments.

c. Train technical staff and operators on client's premises as to the proper use, maintenance and operation of mini-labs and other photofinishing equipments.

d. Direct and coordinate activities concerned with providing technical services and support to customers in the use and operation of mini-labs and other photofinishing equipment.

e. Coordinate technical liason services between manufacturers of mini-labs and other photofinishing equipment and end-users of same.

f. Inform customers of new types and specifications and end uses of products.

g. Investigate customer complaints regarding quality, tolerances, specifications and delivered conditions of products.

h. Discuss with product manufacturers as to new specifications required by customers.

The job requirements were amended to include a B.S. in Mechanical Engineering, three years of experience in the job offered, and the following special requirements:

a. Excellent communication skills in English and Spanish.

b. Available to travel abroad continuously on short notice.

c. Knowledge and use of specialized tools such as oscilloscope, logic probe, multimeter and densitometer in installation, servicing and repair of minilabs and other photofinishing equipment. (AF 147-150).

On October 26, 1987 the C.O. issued a second Notice of Findings. Therein, she cited, inter alia, 20 C.F.R. §656.21(b)(2)(i), which mandates, in pertinent part, that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States. The C.O. stated that the

requirement of a degree in Mechanical Engineering appeared to be tailored to Alien's qualifications and instructed Employer to rebut this finding by amending the college degree requirement or, in the alternative, by documenting how the requirement arises from business necessity. (AF 55-56).

Employer in its Rebuttal of November 16, 1987 argued that its requirement of a four-year degree in Mechanical Engineering arises from business necessity because it sells and services expensive and highly technical equipment and therefore requires a well educated and experienced Technical Services Manager to provide customer support. (AF 59-60). In addition, Employer further submitted that were it necessary to reduce or amend the requirements for the position, it was willing to do so. (AF 58).

Between November 1987, the time of Employer's Rebuttal, and March 1988, Employer and the Department of Labor engaged in discussions regarding the job requirements for the position. These discussions were confirmed in a letter, of March 17, 1988, from Employer's counsel to the DOL Local Office in Puerto Rico. DOL's Regional Office in New York had proposed the following changes: 1) that any job applicant be admitted to the College of Engineers in the Commonwealth of Puerto Rico (which is the professional licensing agency for Engineers), and 2) that the requirement of a university degree be eliminated or that any job applicant possess a university degree in the field of Electronic Engineering, rather than Mechanical Engineering. Employer stated that it did not accept the Department's proposal. First, it stated that the job does not require the signing of blue prints and other such documents and that an engineering license is therefore not necessary for the performance of the job. Secondly, Employer said that the advertised position requires an individual with a degree in Mechanical Engineering because the position entails the servicing, maintenance and repair of highly sophisticated equipment. (AF 77-78).

On April 12, 1988 in the Final Determination, the C.O. noted Employer's refusal to amend its job requirements and did not accept its argument as to how those requirements arise from business necessity. She therefore denied certification based upon 20 C.F.R. §656.21(b)(2)(i). (AF 85-86).

On April 29, 1988 Employer filed a Request for Review (AF 248-254), and on September 8, 1988 filed its Brief.

Discussion

`The issue presented in this case is whether Employer's requirement of a degree in Mechanical Engineering is a requirement that arises from business necessity. In order to establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirement bears a reasonable relationship to the occupation in the context of the employer's business and is essential to perform, in a reasonable manner, the job duties as described by the employer. In Re Information Industries, Incorporated, 88-INA-82, (February 9, 1989) (en banc).

We will assume for the sake of argument that the requirement of a degree in Mechanical Engineering bears a reasonable relationship to the occupation as described by Employer in the context of Employer's business. Employer must therefore demonstrate that the requirement of a Mechanical Engineering degree is essential to perform, in a reasonable manner, the job duties as described by Employer. In this regard, the C.O. had proposed that Employer eliminate its requirement for a college degree or amend the requirement to call for a degree in Electrical Engineering rather than Mechanical Engineering. (AF 78). Employer maintains that an individual with a degree in Mechanical Engineering will understand the internal workings of its complicated products, whereas an individual with a background in Electrical Engineering would not necessarily understand the internal workings or "mechanics" of these items and would therefore not be able to service, maintain or repair a defective piece of equipment. (AF 77, 251).

The evidence submitted by Employer to justify its requirement for a Mechanical Engineering degree consists primarily of product lists and promotional materials for its merchandise. (AF 155-230). The remaining evidence consists of letters from Employer's former customers expressing gratitude for Alien's services. (AF 59-60). The sales lists, promotional materials and letters submitted by Employer do not adequately illustrate the complexity of the inner parts and mechanical components of the equipment, i.e., the very parts of the machinery that Employer asserts Alien will be called upon to install, service and repair. Employer's evidence demonstrates merely that its products are diverse and technical, but it does not demonstrate the nature of the inner workings of the machinery, a showing necessary for us to determine the need for a degree in Mechanical Engineering, as opposed to a degree in some other discipline.

In short, Employer's evidence fails to meet the burden of proof to demonstrate the business necessity for a degree in Mechanical Engineering, and we therefore affirm the C.O.'s denial of labor certification.

ORDER

The determination of the Certifying Officer denying labor certification is hereby AFFIRMED.

JAMES GUILL
Administrative Law Judge

JG/KS